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No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The U.S. Department of Justice and the Federal Trade Commission join Volvo in urging reversal of the judgment below because "there simply was no evidence that Volvo engaged in price discrimination in any transaction in which Reeder actually competed with another Volvo dealer for a sale." U.S. Br. 17.

Reeder does not seriously dispute that fact. Instead, it contends that liability properly can be imposed even when there is *no* transaction in which each of the essential elements of a Robinson-Patman Act (RPA) violation is present. Volvo's and the antitrust enforcement agencies' position is derided as a "novel transactional theory of 'competition.'" Resp. Br. 1.

Volvo's view is not "novel" and it is not a "theory." It is settled law, grounded in the plain language of the statute and in sound antitrust policy. Reeder's suggestion that treble damages can be assessed through a mix-and-match approach – showing one element of a statutory violation in one transaction, and a different element in an entirely unrelated transaction – would vastly expand the scope of the RPA. That expansion "would sacrifice vibrant interbrand competition * * * for an illusory gain in intrabrand competition." U.S. Br. 10; see also NEMA Br. 25; TMA Br. 10-12.

I. "Discrimination" In The Sales-To-Sales Comparisons Did Not Violate The RPA

Discrimination in price, standing alone, does not violate the RPA. The statutory language states plainly that discrimination is unlawful only if a plaintiff proves, among other things, (1) competitive injury – either a substantial lessening of competition "in any line of commerce" or an injury to "competition with any person who either grants or knowingly receives the benefit of such discrimination" – and (2) that the competitive injury was "the effect of such discrimination." 15 U.S.C. § 13(a).

Reeder emphasizes the price differences reflected in the "sales-to-sales" comparisons, *i.e.*, comparisons between (1) the price Volvo offered to Reeder in connection with Reeder's successful bid to sell to one retail customer – Customer A – and (2) the price Volvo offered to another dealer in connection with that dealer's bid to sell to a *different* retail customer – Customer B. Such comparisons account for the $280,000 "discrimination" claimed by Reeder. Resp. Br. 1. In these comparisons, there was no evidence that Reeder bid to sell trucks to Customer B, or that another Volvo dealer bid to sell trucks to Customer A. In fact, Reeder never even took the preliminary step of requesting a price quote from Volvo for Customer B, nor did any other Volvo dealer request a price quote from Volvo for Customer A. Reeder acknowledges that "there was no evidence" of bidding competition between Volvo dealers for these sales, but stakes its claim on the proposition that "it was simply not an element of Reeder's proof under section 2(a) to show whether another Volvo dealer was bidding for the same order." Resp. Br. 29 n.8. That contention is plainly wrong.

1. In the transactions that comprise the sales-to-sales comparisons, the price "discrimination" by Volvo could not possibly have cost Reeder a sale to Customer B. Reeder never made an offer to sell to Customer B, and did not even request a quote from Volvo in anticipation of a possible offer. It is unclear, but irrelevant, whether that was because Reeder made no effort to sell to Customer B, or because Customer B had no interest in buying from Reeder for reasons unrelated to price. What is crystal clear – and fatal to Reeder's RPA claim – is that Reeder's failure to make a sale to Customer B could not have been "the effect of" price discrimination. Neither Customer B nor Reeder could have known (and therefore neither could have based its business decisions on) the price that Volvo might have

offered to Reeder for a sale to Customer B.[1] *Reeder didn't even bother to ask.*

Nor could the "discrimination" have dampened Reeder's profits on its sale to Customer A. To be sure, Reeder would have preferred a lower price from Volvo. What customer wouldn't? As the government explains, however, that is a concern about "price, not price discrimination." U.S. Br. 23; accord 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b, at 89 & n.1 (1999). There is simply no evidence, and not even an articulated theory, that Reeder could have earned greater profits on its sale to Customer A if Volvo had raised its price to the other Volvo dealer selling to Customer B so as to eliminate this "discrimination." To the extent that "competition" constrained Reeder's profits on its sale to Customer A, that competition did not come from the other Volvo dealer. Customer A had no way of knowing what price the other dealer might have offered to it and Reeder could not have known either, because no such offer was extended. Nor could Customer A, Reeder, or the other Volvo dealer have known what price Volvo would have offered to the other dealer for a sale to Customer A, because the other dealer never requested a quote from Volvo for a sale to Customer A.

2. Recognizing that there was no evidence that another Volvo dealer actually bid against Reeder in any of the sales-to-sales comparisons, Reeder grasps at straws. "[E]ven if no other Volvo dealer has sought a concession quote at the same time [as Reeder], that does not mean that competition among Volvo

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[1] We give Reeder every benefit of the doubt – and then some – when we suggest that Reeder could not have known what price Volvo would offer to another Volvo dealer in this circumstance. In fact, the record is clear that Volvo's policy was to offer the same price to all dealers who were bidding for the same retail transaction. Reeder's evidence shows, at most, imperfect execution of that policy on rare occasions, and even that reading of the evidence is dubious. See pp. 11-13, *infra*.

dealers has been extinguished as to that transaction. The customer may at any time before purchase decide to turn to a second Volvo dealer." Resp. Br. 29 n.8. To sustain the judgment below, however, Reeder must point to evidence of what did happen, not mere speculation about what could have happened but did not. We do not quarrel with the proposition that another Volvo dealer was free to compete against Reeder for any sale or that retail customers were free to solicit bids from any Volvo dealer. The fact remains, though, that in the sales-to-sales comparisons there is no evidence that either of those things actually happened.

Moreover, Reeder's suggestion that liability can be based on such hypothetical competition requires speculation twice over. It is not enough for Reeder to observe that Customer A, hypothetically, could have solicited and received a bid from another Volvo dealer. Reeder must also *assume* that Volvo, if asked (as it was not), would have offered a different price to the other dealer than it offered to Reeder for that transaction. In other words, to sustain liability on this basis, Reeder must imagine both the discrimination and the competition with another Volvo dealer that the statute requires; nothing in the record suggests that either actually occurred.

3. The next line of defense is even more curious. Acknowledging "the *fact* that there was no evidence of price competition between Reeder and the other Volvo dealers in the bidding phase" (Resp. Br. 29 (emphasis added)), Reeder suggests a different theory: Because it paid higher prices than other Volvo dealers paid for trucks in unrelated transactions, Reeder's profits were limited, and that constraint on its profits injured its ability to engage in pre-bidding competition by offering various customer-attracting services. See Resp. Br. 27 (discussing advertising, marketing, enhanced service, promotion, and other customer-attracting services). That assertion is wrong under the law, as we explain in a moment. It is an

especially curious argument, though, because elsewhere in its brief Reeder emphasizes that during the period of the alleged discrimination

> [i]t invested in a new and more desirable dealership location * * * and hired additional salespeople. It aggressively sought sales from old and new accounts. Reeder steadily increased the number of customers that it brought to the point of a price quote, succeeding in quoting potential sales of 3,726 trucks from 1997 to 1999.

Resp. Br. 12. From these facts, it is evident that Reeder's ability to engage in pre-bidding competition was not impaired.[2] Thus, there was no evidence that the "discrimination" in the sales-to-sales comparisons interfered with Reeder's *opportunities* to bid for sales and, as shown previously, no evidence that the "discrimination" affected competition between Reeder and other Volvo dealers when they actually submitted bids for sales – because there was no competition between Reeder and any other Volvo dealer in the bidding for these sales.

In any event, Reeder's claim that its profits were impaired because it paid a higher price than other Volvo dealers paid in unrelated transactions is legally insufficient to support RPA liability, as well as being factually wrong. The reason is simple. Reeder's argument is merely a thinly disguised claim that it would have been better off with a lower price. In *every* instance of price discrimination, the purchaser who pays more will have

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[2] Reeder might argue that, even though its ability to engage in pre-bidding competition was not impaired in the short term, it will be impaired in the longer term. That argument, too, is insufficient to support the judgment. A likelihood of future competitive harm might support an action for an injunction; it will not support an award of damages under Section 4 of the Clayton Act. To recover damages, a plaintiff "must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 563 (1981) (emphasis in original).

fewer resources with which to compete for future sales. To hold that such an "injury" is sufficient to establish liability would remove all content from the statute's requirement that plaintiffs must prove not only discrimination, but also a competitive injury that is caused by the discrimination. Under Reeder's theory, price discrimination would always be illegal unless the defendant could prove that the discrimination was permitted by one of the RPA's affirmative defenses.

To illustrate the point, consider how Reeder's argument would apply in the following situation. Imagine that in the heavy truck market every Volvo dealer competes for every retail sale, and every retail sale involves commodities of like grade and quality. For each potential transaction between a dealer and a customer, Volvo offers exactly the same price to every dealer, but for sales to different retail customers Volvo offers (equally to every dealer) different prices. It would be absurd to suggest that such pricing by Volvo would violate the RPA. For each transaction, Volvo offers every dealer *exactly* the same price.

But if, in this hypothetical example, one dealer was more successful in selling to those retail customers for whom Volvo offered higher prices and another dealer was more successful in selling to retail customers for whom Volvo offered lower prices, the first dealer could make exactly the claim that Reeder makes here. The first dealer could show that it paid higher prices, on average, than the second dealer; that it could have earned greater profits if its average price had been lower; and that greater profits would allow it to invest more in "customer-attracting" services. It could make those showings even though the prices charged by Volvo had no effect at all on any dealer's ability to compete with any other dealer for any sale. The competition among dealers yields different outcomes for different dealers simply because each dealer adopts its own business strategy, because each dealer executes that strategy with greater or lesser skill, or because of random variation, not because of

price "discrimination" by Volvo. Under Reeder's theory, Volvo nevertheless would be liable for price discrimination in violation of the RPA unless it justified the discrimination by proving an affirmative defense. And Volvo could safely avoid that liability only by charging uniform prices in all transactions. As the antitrust agencies recognize, a rule of law that requires such price rigidity "would limit suppliers' ability to tailor prices to the competitive situation, and thus diminish the vigor of interbrand price competition." U.S. Br. 27.

It is no accident that Reeder's so-called competitive injury occurs in both the hypothetical example and the actual sales-to-sales comparisons. The effect does not arise in either case from discrimination between competing purchasers. It arises in both merely because every purchaser is "injured" by paying a higher price rather than a lower price, *regardless of the price other purchasers pay*, and because every purchaser can assert that a lower price would permit greater investment in its future competitive endeavors. Reeder does not suggest any limitation of its theory of competitive injury that would prevent such "injury" from arising in every case in which there is a price difference.

Reeder's theory, therefore, would radically expand the inference of competitive injury discussed in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). It would convert a *permissible* inference that price differences may cause the requisite competitive harm into a rule that plaintiffs who show price differences, but nothing more, will *always* be able to recover damages. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), squarely rejected that proposition, and *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), reaffirmed the point. Plaintiffs must prove that price differences are the cause of their injury; the *Morton Salt* "inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id.* at 435.

4. The jury's finding that Reeder and other Volvo dealers operated in the same relevant market does not require this Court to affirm the judgment.

Reeder is simply wrong when it argues (Resp. Br. 20-23) that, because it operates in the same relevant market as other Volvo dealers, price differences necessarily injure its "competition with" those dealers, even in the absence of competing bids for any potential sale.[3] The decisions of this Court that Reeder cites say nothing like that. Quite the contrary. In those decisions, the Court explicitly discussed evidence that the favored and disfavored purchasers *did* compete for the same customers, and that the price discrimination led directly to a diversion of sales from disfavored to favored purchasers. See *Falls City*, 460 U.S. at 437 (discussing "direct evidence of diverted sales"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 510 (1963) (testimony from disfavored purchasers that their customers turned to favored purchaser because of his lower price); *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 62 (1959) (discussing finding that purchasers "in the same shopping area, often side by side, were competitors * * * retailing the identical product to substantially the same segment of the public").

The statutory language provides no more support for Reeder than the case law. The closest the Clayton Act and the RPA, which amended the Clayton Act, come to using the words "relevant market" is various places in which they refer to a "line of commerce" or to a "section of the country." See, *e.g.*, 15 U.S.C. § 18 (prohibiting acquisitions that may substantially lessen competition "in any line of commerce * * * in any section of the country"). Those terms have been construed, respec-

[3] Reeder's expansive definition of "competition with" is necessary, but not sufficient, for affirmance. As we have explained, Reeder also must prove an *injury* to its competition with a favored purchaser that is *caused* by the discrimination, regardless of how "competition with" is defined.

tively, to require proof of a relevant product market and a relevant geographic market. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962). Section 2(a) of the RPA uses the phrase "line of commerce" but only in reference to the first type of cognizable competitive injury, *i.e.*, a substantial lessening of competition "in any line of commerce." The statute does not refer to a "line of commerce" or to a "section of the country" when it describes the second type of competitive injury – the injury that Reeder claims – as harm to "competition with any person who either grants or knowingly receives the benefit of such discrimination."

"Competition with" a knowing beneficiary of discrimination is a more specific and narrower form of competition than competition throughout a "line of commerce." See pp. 19-20, *infra*. Reeder acknowledges this obvious point, then runs from it. While contending that *every* Volvo dealer in the relevant market is necessarily engaged in competition with Reeder, even if it has never competed for a single sale with many of those dealers (Resp. Br. 20-23), Reeder also asserts virtually the exact opposite: "[O]nly an individual competitor can be in 'competition *with*' another competitor." Resp. Br. 39 (emphasis in original). Those contradictory assertions cannot be reconciled.

Respondent's creative and selective quotation of Professor Hovenkamp (Resp. Br. 25) is also wide of the mark. A reading of the complete discussion of this point in Professor Hovenkamp's treatise makes clear that, in his view, the contours of the relevant market provide the "most obvious" criteria for determining whether favored and disfavored purchasers are competitors for purposes of the RPA, but not the *right* criteria. See 14 HOVENKAMP, *supra*, ¶ 2333b, at 89-90. "Most decisions focus on the basic question whether the favored and disfavored purchasers are trying to reach the same set of customers." *Id.* at 90. That is precisely the test that Reeder cannot satisfy here,

with respect to the other Volvo dealers involved in the sales-to-sales comparisons.

Professor Hovenkamp does not suggest that market definition is unrelated to the existence of "competition with" a favored purchaser in *every* RPA case, nor do we. But competition in the heavy truck market is very different from competition in other markets that may more legitimately be constrained by the RPA. In markets for standardized products that are sold from inventory at posted prices available to all purchasers, the relevant market may correspond closely to the "competition" required under the RPA. In that situation, a manufacturer cannot readily tie its price to a dealer to the identity of an individual *retail* customer the dealer might serve, so price discrimination may affect the disfavored dealer's ability to compete for *all* of its potential sales. Heavy trucks, though, are customized products, built to order *after* a sale, at retail prices and terms that are established on a transaction-by-transaction basis through customer interactions with the specific dealers competing for that sale. See Resp. Br. 4-5, 30-31. The sales-to-sales "discrimination" also occurred on a transaction-by-transaction basis, tailored to the specific circumstances of each potential retail sale. Because Volvo's wholesale price for a sale to one retail customer did not determine the wholesale price that would be available for a sale to a different retail customer, a "high" price in one transaction did not injure Reeder's "competition with" other Volvo dealers in unrelated transactions.

Reeder would simply brush aside these market realities in favor of an inflexible concept of "competition" that finds no support in the language of the statute, its competitive objectives, or prior judicial decisions.

II. "Discrimination" In The Head-To-Head Comparisons Did Not Violate The RPA

Liability cannot be based on the rare head-to-head comparisons in which Reeder and another Volvo dealer submitted bids for the same potential sale. Even if those comparisons reveal discrimination (a dubious premise on this record), they reveal, at most, discrimination between a purchaser and an offeree, not the discrimination "between different purchasers" that the RPA addresses.[4] In any case, Reeder seems to concede that this discrimination, standing alone, is insubstantial.

1. Reeder apparently has abandoned any contention that liability can be based on the transaction in which Reeder and another Volvo dealer submitted competing bids to sell trucks to Tommy Davidson; its brief makes no reference to this transaction at all. Volvo did not sell to either of its dealers in that transaction because the customer chose to purchase Freightliner trucks. Moreover, Volvo offered the same 18.9% concession to Reeder that it offered to the dealer against which Reeder was bidding. Reeder complained only that Volvo's price concession was untimely, not that there was discrimination "in price." JA 192-194.

Reeder now points to a new comparison, involving a potential sale to TSL. Resp. Br. 15. In this transaction, like the Tommy Davidson transaction, the customer ultimately decided that it would not buy Volvo trucks. There was no discrimination "between different purchasers" here (or in the Tommy Davidson transaction) because there was not even one "purchaser," much less two. And this transaction is not even a true head-to-head comparison involving two *bids* from different Volvo

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[4] The offer-to-sales comparisons (see Pet. Br. 6) suffer from the same deficiency, and also from the deficiencies that are present in the sales-to-sales comparisons discussed previously. For that reason, they require no separate discussion.

dealers; there is no evidence that the other Volvo dealer ever submitted a bid to TSL.[5]

The evidence reveals only one transaction – the Hiland Dairy transaction – in which Reeder lost a sale to another Volvo dealer.[6] In that transaction, Volvo initially offered the *same* price to Reeder and to Southwest Missouri Truck Center (SMTC), another Volvo dealer competing for the Hiland sale. JA 475-477. Volvo later granted an additional price concession to SMTC, to compensate partially for an increase in Volvo's list prices that occurred between SMTC's initial bid to Hiland in January and the day in August when, according to Mike Truta, "the dealer from Springfield called and said I got the order, the customer will take it under this provision. I'm sitting in his office." JA 364. The additional concession was granted only when Hiland chose to purchase from SMTC for reasons unrelated to Volvo's prices. Truta testified without contradiction that Hiland Dairy's decision to purchase from SMTC, rather than Reeder, was a "done deal" when he granted the additional concession on August 19, 1999. JA 353. Reeder's only basis (Resp. Br. 14-15) for questioning the testimony that the deal was already "done" when the additional concession was granted

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[5] The only evidence in the record on this point comes from the cross-examination of Bill Heck, Reeder's co-owner and manager. "[Y]ou don't know if the Charlotte dealer actually decided to submit a bid to, to TSL, do you? A. I think there's information in there that they elected not to, but I don't have any direct knowledge of that." 1/16/02 Tr. 467.

[6] Reeder strains to find ambiguity in Bill Heck's testimony (JA 305) that Reeder competed against another Volvo dealer for the same sale only two or three times. See Resp. Br. 25 n.5. But, regardless of how Mr. Heck's testimony is construed, the only examples of such competition that were identified at trial are those mentioned here. Reeder invites speculation that there were other examples of head-to-head competition beyond those shown at trial, but it does not even suggest, let alone point to *evidence* of, discrimination in the price that Volvo offered in these assumed, but unidentified, transactions.

on August 19 is the fact that the invoice confirming the order was *received* by Volvo on August 21, 1999. JA 91-92.

Although we submit that the jury had to accept Truta's uncontradicted testimony rather than make up a contrary version of the facts with no evidence, in the end it makes no difference. What Truta's testimony illustrates is *why* the two-purchase rule that has been settled law for decades (Pet. Br. 25-28) makes sense (see *id.* at 28-29). Even if one assumes Truta's testimony to have been false, all that follows is that the Hiland Dairy transaction is a less good illustration of why the rule makes sense, not that the rule no longer exists or that Reeder has proven what the words of the statute require, "discriminat[ion] in price between different purchasers of commodities of like grade and quality." 15 U.S.C. § 13(a). If Mike Truta had picked up the phone on August 19, 1999, and asked a lawyer to advise him whether the RPA required him to offer Reeder the same price he had just offered to SMTC, a competent counselor would have consulted the treatises cited at Pet. Br. 26-27 and confidently answered "no" – notwithstanding the outlier decisions cited on page 49 of Reeder's brief, which *assume* that it is "wrong" to behave in this manner and then say the defendant should not be "rewarded" for engaging in conduct that the court apparently does not like, but that Congress has not outlawed.[7]

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[7] The Rowe treatise, which Reeder includes in its string citation on page 49, supports Volvo, not Reeder. It notes that the "doctrine" of the *Shaw's* case, cited in our opening brief at 26, "has been invariably reiterated in the decisions which reject Robinson-Patman allegations * * * seeking to construct a discrimination from mere price quotations rather than at least two completed sales." It then notes that "one court held" to the contrary, citing the same 1951 Fifth Circuit decision that appears on page 49 of Reeder's brief. FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.1, at 47-48 & n.11 (1962). The Fifth Circuit itself is no longer an outlier. See *M.C. Mfg Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059, 1066-1067 & n.17 (5th Cir. 1975) (following two-purchase rule in situation indistinguishable from this case), cert. denied, 424 U.S. 968 (1976); see also

2. The RPA prohibits only discrimination "between different purchasers." If there was any "discrimination" at all in the head-to-head comparisons, it was discrimination between a purchaser and an offeree (in the Hiland Dairy transaction) or between two offerees (in the Tommy Davidson and TSL transactions). It is settled law that the RPA does not apply to such discrimination. See Pet. Br. 25-29.

Reeder describes the two-purchase rule as an "exemption" for "sales * * * that are not from inventory" and criticizes the "arbitrary effect" of the rule because "application of the RPA does not depend upon the business model an industry adopts." Resp. Br. 30-31. Reeder is wrong on all counts. The two-purchase rule does not create an "exemption" from the RPA, but merely acknowledges that the RPA does not apply in the first instance unless two sales occur. And the rule does not prevent the application of the RPA to "sales." It recognizes that the RPA does not apply in the *absence* of two sales.

More fundamentally, the application of the RPA unquestionably *does* depend on the "business model" the defendant uses, because Congress banned price discrimination only in specifically defined types of transactions. "We are not interpreting a broadly phrased constitutional provision, but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions." *FTC* v. *Sun Oil*, 371 U.S. at 528; see also WLF Br. 5-6. The statute applies to sales of commodities, but not to sales of services. It applies to sales "in commerce" but not to sales "affecting commerce." It applies to discrimination "between different purchasers" but not to discrimination between lessees, licensees, consignees, or sales agents. Indeed, most treatises on the RPA begin with discussion of the "jurisdictional" elements of the RPA – including the two-

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API Br. 6 & n.3. It does appear that the Sixth Circuit may remain an outlier. See U.S. Br. 18 n.10.

purchase requirement – and a recitation of the countless cases that turn on whether the discriminatory transactions are of the kind (*i.e.*, reflect the "business model") that the statute addresses. See, e.g., ROWE, *supra*, ch. 4, at 45-86; 14 HOVENKAMP, *supra*, ¶¶ 2310-2316, at 12-53; EARL W. KINTNER, A ROBINSON-PATMAN PRIMER 35 (2d ed. 1979).

All of these "jurisdictional" distinctions are "arbitrary" in the sense that any exercise of legal line-drawing is arbitrary. See RICHARD A. POSNER, THE ROBINSON-PATMAN ACT 34-37 (1976). Practices barely on one side of the line may be similar in effect to those barely on the other side of the line. But if a line is to be drawn it must be drawn somewhere, and it was rational for Congress, in the RPA, to draw the line between sales and offers. As Professor Hovenkamp explains, the two-purchase rule "is simply another way of saying that there is no 'attempt' offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated." 14 HOVENKAMP, *supra*, ¶ 2312d, at 27.

3. Reeder does not limit its argument to a frontal assault on the two-purchase rule; it also seeks to evade the rule by misdirection. It suggests that it "did not have to rely on 'mere offers' to establish actionable discrimination, and the jury did not find discrimination on that basis. Moreover, Reeder disclaimed that it was seeking damages for each of the discriminations." Resp. Br. 48-49 (citations omitted). But it then asserts that mere offers may be relied on to establish "antitrust injury in fact" and that the jury may rely on evidence of these offers "in weighing the causes of antitrust injury and damages." *Id.* at 49.

That is nonsense. If the jury did not find a violation from transactions in which there were "mere offers," then those transactions cannot establish "antitrust injury in fact" which must, of course, arise "from that which makes [the] defendant's acts un-

lawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). And if Reeder's "injury" in these transactions is not an "antitrust injury in fact" than it cannot recover damages for that injury. Antitrust plaintiffs who prove violations and antitrust injury in fact are not required to prove the *amount* of damage injury with precision, but that leniency does not excuse them from the requirement of showing a violation and an injury that flows from that violation. *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 19, 21-22 (1st Cir. 1981) (Breyer, J.). That is exactly the point of *J. Truett Payne*. See 451 U.S. at 562 ("To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."); *id.* at 569 ("Absent such a finding [of liability], we decline to apply to this case the lenient damage rules of our previous cases.").

4. Finally, the effect of the discrimination (if, in fact, there was discrimination) in the head-to-head comparisons is insubstantial. The loss of $30,000 gross profit in a single sale to Hiland Dairy (Resp. Br. 15; JA 100) cannot support RPA liability, even under a broad reading of *Morton Salt*, because the *Morton Salt* inference of competitive injury may be invoked only for substantial discrimination over time. See *Morton Salt*, 334 U.S. at 50; *Falls City*, 460 U.S. at 435; 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 22.6 (1983).

Reeder does not argue that "discrimination" in the Hiland Dairy transaction, standing alone, would constitute a violation of the RPA, much less that it would support the treble-damage award of $4,074,000. Pet. App. 33a. Instead, Reeder's claim of *substantial* discrimination rests on the sales-to-sales comparisons, in which Reeder purchased 102 trucks from Volvo. Resp. Br. 1, 43-47. Even if the head-to-head transactions would otherwise constitute cognizable discrimination, the judgment should be reversed because of their insubstantial effect.

III. The RPA Protects Competition, Not Individual Competitors

The preceding arguments provide ample grounds to reverse the judgment below, on the basis of settled law. However, this case also provides an opportunity for this Court to go further, if it chooses to do so, to resolve an important legal question that has divided the lower courts: Does the RPA protect the commercial interests of individual competitors when there is no injury to the process of "competition"?

1. The Court properly may decide this broader question if it chooses to do so. Reeder argues that Volvo waived its argument on this issue by failing to raise it in the petition for certiorari or to object to a contrary jury instruction at trial. Resp. Br. 35. But Volvo *did* raise the issue in its petition, noting that the circuit split on this question could be resolved through a grant of certiorari. Pet. 16 n.3. The issue was not explicitly raised in the Questions Presented, but is sufficiently intertwined with the questions that were identified that this Court may reach the issue, consistently with its precedents, if it chooses to do so. See, *e.g.*, *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); Pet. Br. 32 n.9.

Reeder is also wrong in its apparent belief that unobjected-to jury instructions, even if erroneous, forever bind courts and parties to whatever view of the law is stated in the instructions in reviewing whether the plaintiff had a claim at all. That is not correct; unobjected-to jury instructions waive only a claim of instructional error, not an objection to sufficiency under the correct law. In the latter kind of challenge, the key is whether the sufficiency of the plaintiff's evidence was disputed in a motion for directed verdict or for judgment as a matter of law, as it was here. See JA 4, Pet. App. 35a. If so, the correct law should be applied on appeal, whatever the jury instructions may say. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 513-514 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120

(1988) (plurality opinion); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537, at 348-349 & n.14 (1995 & Cum. Supp. 2005); *id.* § 2558, at 460-461 & n.9.

City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) – which the *Praprotnik* plurality carefully distinguished in a discussion later adopted as a holding of this Court in *Boyle* – does not suggest otherwise. In that case, the writ of certiorari was dismissed as improvidently granted. The Court made clear that there was "no jurisdictional bar" (*id.* at 259) to its consideration of the issue, merely a question whether it should "exercise * * * discretion" (*id.* at 260) to do so. The Court concluded that it would not be prudent to do so in that case, largely because of concerns about "reversing a judgment *because of instructions* that petitioner accepted." *Id.* at 259 (emphasis added). Here, Volvo does not seek reversal because of improper but unobjected-to jury instructions. Volvo seeks reversal because there was no evidence to support the judgment under the correct law. And Reeder, while placing primary emphasis on its invalid waiver argument, and secondary emphasis on its legal argument that the RPA protects against harm to individual competitors, does not identify any evidence in the record to support the judgment below if, as we believe the Court properly may decide, the RPA requires harm to competition instead of mere harm to an individual competitor.

2. "Not every harm to the competitor * * * violates the Act," according to Reeder, only discrimination that has the "probable future effect" of harming the disfavored purchaser's competition with the favored purchaser. Resp. Br. 39 (quoting *Brown Shoe*, 370 U.S. at 332). As we have seen, however, under Reeder's conception this "probable future effect" on competition arises from every difference in price, regardless of its real competitive effects. Thus, the limitation Reeder suggests is an illusion.

The facts of this case demonstrate the point. Reeder itself emphasizes that "competition was keen and dealer profit margins were thin and compressing." Resp. Br. 34. Dealers worked diligently to develop customer relationships and opportunities to pitch new truck sales. *Id.* at 6. The result of this competition was record sales for Volvo and for the Class 8 truck industry as a whole. *Id.* at 11. And there can be no doubt that Volvo's (and other manufacturers') practice of reducing prices in an effort to win especially valuable retail customers had the purpose and effect of intensifying competition (both intrabrand competition and interbrand competition) to supply trucks to those customers. By offering lower rather than higher prices for sales to these customers, Volvo encouraged its dealers – *all* of its dealers, since the low price for that retail customer was offered to every dealer who requested a price quote – to compete more aggressively for that retail sale, whether they were competing against other Volvo dealers or against dealers selling other brands of trucks. Volvo's low price enhanced its dealers' opportunities to make additional sales in competition with other brands of trucks, to earn greater profit margins on their sales, or both. By creating greater incentives for its dealers to serve these retail customers, Volvo enhanced competition among dealers. That conclusion cannot be disputed merely because, in this competition as in all others, some of the competitors were winners and some were losers.

Reeder points to an economic text to support the point that price discrimination "can be" inefficient in some cases. Resp. Br. 41 n.16. We agree. The relevant legal issue, though, is whether Congress enacted a blanket prohibition against price discrimination, regardless of its effect on "competition," or whether it condemned only discrimination that causes injury to "competition." The statutory text answers that question. Reeder cannot point to any record evidence that Volvo's discrimination here was inefficient or that it harmed intrabrand or

interbrand "competition." In the complete absence of such evidence, the judgment should be reversed.

To the limited extent that Reeder actually addresses the relevant legal issue, its argument rests largely on broad generalities drawn from the legislative history of the RPA and from *dicta* in this Court's prior decisions, giving short shrift to what the statute actually says. As we have shown, the RPA refers to "competition" in a "line of commerce" (the competition addressed in the original Clayton Act) and "competition" with the beneficiaries of discrimination (the competition addressed by the RPA, which amended the Clayton Act). The language suggests a straightforward distinction between competition in a "line of commerce" that encompasses both interbrand and intrabrand competition (the first kind of injury) and intrabrand competition between favored and disfavored purchasers (the second kind of injury). Neither injury, though, is described as harm to an individual "competitor." See Pet. Br. 35-40.

Harm to "intrabrand competition" is, of course, very different from harm to "a competitor engaged in intrabrand competition." The latter is a precursor of the former *in some cases*. But in other cases, harm to the individual competitor (though not antitrust injury, *Brunswick*, 429 U.S. at 489) flows from the *enhancement* of intrabrand competition, simply because vigorous competition by definition creates winners and losers. And in still other cases, as here, the "harm" to an individual competitor may be entirely unrelated to the defendant's "discrimination." If a plaintiff utterly fails to produce evidence of anything more than a diminution of its own commercial success, and if the evidence shows vibrant intrabrand and interbrand competition, the RPA has not been violated.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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